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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1194

JOHN C. STEWART,

Petitioner,

versus

WATERMAN STEAMSHIP CORPORATION and ALCOA STEAMSHIP CO., INC.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

JOHN W. SIMS
Attorney for Respondent,
Waterman Steamship Corporation
1300 Hibernia Bank Bldg.
New Orleans, Louisiana 70112

HARRY S. REDMON, JR.
Phelps, Dunbar, Marks, Claverie & Sims
of Counsel

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John C. Stewart, (Stewart) a seaman, filed suit for damages under the Jones Act and the General Maritime Law, including the warranty of seaworthiness, and for maintenance and cure, against Waterman Steamship Corporation (Waterman), and against Alcoa Steamship Co., Inc. (Alcoa) for maintenance and cure only.

On the morning of the trial Stewart abandoned his claim for damages under the Jones Act and the General

Maritime Law against Waterman, and proceeded to trial against both defendants for maintenance and cure only.

OPINIONS BELOW

Stewart's claims were tried in the United States District Court for the Eastern District of Louisiana, New Orleans Division, before the Honorable Edward J. Boyle, Jr. on September 14 and 15, 1967. After considering all the evidence and briefs of counsel, the District Judge rendered judgment in favor of both respondents and against the petitioner. The judgment was entered on August 7, 1968. The opinion is reported at 288 F. Supp. 629. Thereafter, petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The District Court's opinion was affirmed, *per curiam*, on April 28, 1969, and is reported at 409 F.2d 1045. Petitioner's petition for rehearing and petition for reconsideration of application for rehearing were denied on July 14, 1969 and November 19, 1969, respectively.

QUESTIONS PRESENTED

Petitioner designates two questions.

I.

Is a seaman who is suffering from a lesion on the brain which in and of itself is not disabling, but which produces epileptic seizures which do disable the seaman, but which seizures can, with proper medical management and care, be reduced in number and severity thereby allowing the seaman to return to a useful, active and productive life, entitled to maintenance and cure, until such time as he has reached the maximum benefit that medical science can offer him?

II.

Is a seaman who is ignorant of a physical condition to be denied maintenance and cure for failure to advise his employer of his condition?[1]

STATEMENT OF THE CASE

Since only facts are at issue here, respondent must assert them in some detail.

Stewart sought to recover maintenance and cure from Waterman for an illness, epilepsy, and its resulting disability, which allegedly occurred, was aggravated, or manifested itself (his exact contention was unclear) in the service of Waterman's S/S WILD RANGER in September, 1960, and/or in the service of Alcoa's S/S ALCOA PARTNER during the period December, 1960, through April, 1961. In fact, Stewart was suffering from post traumatic epilepsy, an incurable illness, for fifteen years prior to serving aboard either the S/S WILD RANGER or the S/S ALCOA PARTNER, and no change in his condition occurred aboard either vessel.

During December, 1945, while in the United States Navy, Stewart was involved in a serious automobile accident, as a result of which he received multiple brain injuries. (R.256) From December 23, 1945 to January 25, 1946, he was hospitalized in the Veterans Administration Hospital, New Orleans. Surgery was performed to

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[1] Respondent will not discuss the second question, since the District Court did not reach that issue in its opinion. That Court said:

"13.

The Court does not reach respondents' defense that complainant is not entitled to maintenance and cure as a consequence of his concealment or non-disclosure of his pre-existing epileptic condition in view of the result reached on other grounds."

remove a blood clot from his brain. (exhibit-Alcoa-Waterman #2, Report of Dr. Glenn E. Comstock, December 11, 1951) As a result of this accident, he was discharged from the Navy with a 100% disability, which was reduced to 60% after a few years. (R. 258-259)

On June 14, 1948, Stewart was examined for complaints of dizziness and headaches. He complained that the dizzy spells occurred once per month. The diagnosis was encephalopathy, traumatic. (exhibit-Alcoa-Waterman #2, Report of Dr. Brooks A. Colomb, June 14, 1956) *The American Illustrated Medical Dictionary*, 16th Edition, describes encephalopathy as a disease of the brain.

On October 30, 1950, Stewart was again evaluated for nervousness and dizziness. The diagnosis remained a traumatic disease of the brain. (exhibit-Alcoa-Waterman #2, Report of Dr. C. P. May, October 31, 1950)

In 1951, Stewart began a career as a merchant seaman.

On October 5, 1954, Stewart was examined again. At that time he reported to the examining physician that his illness began in 1945 after a head injury, that sometimes he got dizzy and nervous, and that he had suffered two blackout spells. The diagnosis was psychophysiologic nervous system reaction. (exhibit-Alcoa-Waterman #2, Report of Dr. C. P. May, October 5, 1954)

On September 20, 1956, a most pertinent examination was made. During that examination, Stewart related to the Veterans Administration Hospital examiner that he suffered from spells during which he felt funny and passed out, and that when he experienced the spells he

momentarily lost contact "with everything". He further stated that about once or twice a year he would fall unconscious and remain unconscious for about a half hour, would "shakes and shakes" (sic), injure himself in falling, and feel unstable following the attacks. He said that minor attacks came on at irregular intervals. Most significantly, the diagnosis was seizures suggestive of epilepsy. This was four years prior to Stewart's service aboard the S/S WILD RANGER. (exhibit-Alcoa-Waterman #2, Report of Dr. Brooks A Colomb, September 20, 1956)[2]

On June 10, 1960, Stewart signed aboard Waterman's S/S WILD RANGER in New Orleans, Louisiana, as a boatswain. On September 12, 1960, while topping the vessel's gear at sea, he suffered a seizure and fell unconscious. From September 20, 1960, to September 27, 1960, he was hospitalized in the Veterans Administration Hospital in New Orleans. The pertinent medical report for this hospitalization contains a history that he had prior seizures of a similar nature on at least four occasions, beginning in 1946. (exhibit-Alcoa-Waterman #2, Dr. Robert E. Lee, narrative summary) The diagnosis was grand mal seizures secondary to old trauma to the head. He was declared fit for duty on September 27, 1960. (exhibit-Alcoa-Waterman #2, United States Public Health Service Hospital records)

It stands uncontradicted that Stewart sustained a severe head injury in 1945, and began having seizures in 1946. A diagnosis of disease of the brain, traumatic, was made

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[2]In light of the October 5, 1954 and September 20, 1956 medical reports, petitioner's statement that prior to his service aboard the S/S WILD RANGER ". . . . He had only experienced dizzy spells which would leave as quickly as they came and would cause no ill effects. . . ." (Pet.App.P.5) is clearly erroneous, and his contention that ". . . . prior to his service aboard the S/S WILD RANGER, (he) was completely ignorant of his condition" (Pet.App. P. 10) is ridiculous.

as early as 1948, and a diagnosis of seizures, suggestive of epilepsy, was made in 1956. Further, there is no question but that the seizures described in the medical report of September 20, 1956 were of the grand mal type. This conclusion was confirmed at the trial by a neurosurgeon, who testified that in his opinion Stewart was suffering from grand mal epilepsy in 1956. (R. 448, 449,451) There is no contrary evidence in the record.[3]

Having established that Stewart has been suffering from a serious neurological disorder since 1945, and post-traumatic grand mal epilepsy since at least 1956, four years prior to his voyage aboard the S/S WILD RANGER, the next pertinent question is whether there was any change in his condition aboard the S/S WILD RANGER for which Waterman could be legally responsible. There is no question that there was not. Fortunately, there are medical records to which we can refer for the critical 1960-1962 period, since Stewart's trial testimony is wholly unreliable.[4]

Stewart signed on Alcoa's S/S ALCOA PARTNER on December 16, 1960, for a two month voyage to South America, and on February 21, 1961, he signed on for a second two month trip to the Far East. The latter voyage ended on April 26, 1961. He experienced one or more seizures on each voyage (R. 316) and was hospitalized in the United States Public Health Service Hospital, New Orleans, from May 3 to May 15, 1961, with a diagnosis of grand mal epilepsy. Upon discharge he was declared

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[3] Petitioner's assertion that the *diagnosis* of grand mal seizures was not made until after 1960 (Pet. App. P.5) is irrelevant in light of this trial testimony and the documentary evidence.

[4] For example, he testified at trial that his only health problem during the 15 years from 1945-1960 was a couple of dizzy spells sustained while working in the heat, (R.343) and that he had no medical problems during that period which required medical attention. (R. 344, 345)

permanently not fit for duty. (exhibit-Alcoa-Waterman #2, United States Public Health Service Hospital records)

A full year after signing off the S/S ALCOA PARTNER, Stewart was reevaluated by the U.S. Public Health Service. On April 25, 1962, that Service found that he had been on the drug dilantin three times daily and had suffered no convulsions during the prior year. Nonetheless, he was again declared permanently not fit for duty. (exhibit-Alcoa-Waterman #2, United States Public Health Service Hospital records)[5]

After 1962, detailed medical records are no longer available, and it is necessary to consider the 1962 to 1968 period from the trial testimony of Stewart, Mrs. Stewart, and neurosurgeons Drs. Richard W. Levy and Peter J. Jannetta.

According to Mrs. Stewart, during 1962 and 1963, Stewart had seizures quite often, sometimes as often as two or three times a week. (R.123) "They were pretty hard" in relation to today. (R. 124) He urinated on himself at times (R. 127), and there was no warning of their onset. (R. 130) "He drank a lot more than he should have". (R. 143) The drinking is confirmed by the testimony of Dr. Jannetta, as is the fact that Stewart was not taking dilantin regularly. (R. 245) Stewart testified that he did not drink, (R. 347) and that the seizures were bad in 1962. (R. 324) According to Stewart and Mrs. Stewart, improvement in his condition began in 1963. (R. 324, 331, 332) His last sutures of cuts sustained in falling

[5] Petitioner's allegation that "After leaving the S/S ALCOA PARTNER, the petitioner suffered 'bad' seizures during the years 1961 through 1965" (Pet. App. P. 4, P. 5) is again a misstatement of proven facts.

were received in 1965, (R. 327) and the last time he urinated on himself was in 1967. At the time of the trial he was suffering seizures about every four months. (R. 128) Despite this history, he saw no doctors for his seizures save Dr. Jannetta, from 1961 to 1967. (R. 141, 142)

ARGUMENT

As respondent relates above, Stewart's malady was diagnosed as a traumatic disease of the brain in 1948, and as epilepsy in 1956. A highly qualified neurosurgeon testified at trial that Stewart suffered from grand mal epilepsy in 1956. The identical diagnosis was made in 1960 and 1961 after Stewart left respondents' two vessels, and holds true today.

The case was tried before an experienced District Judge, who, after considering the evidence, held:

> ". . . . We find that complaintant was a grand mal epileptic both before, during and after his employment aboard the S/S WILD RANGER and the S/S ALCOA PARTNER.
>
> "The prognosis is that complainant, as an incurable grand mal epileptic, will always to a greater or lesser extent suffer from seizures."

On the above facts, the Court held as conclusions of law that:

> ". . . . However, even if the view be adopted that any manifestation of a pre-existing illness of a seaman while in the service of his ship entitles him to maintenance and cure, complainant is, nonetheless, entitled to no recovery. Complainant's condition is incurable. Any treatment he may receive will be palliative and not curative

> in nature. Future drug therapy may reduce the frequency and severity of his seizures, but will never totally eradicate them."

After considering what was in all respects an appeal on the facts, the Court of Appeals affirmed, *per curiam*, stating:

> "We are unable to say that the district court's findings of fact are clearly erroneous and affirm the court's judgment for the reasons stated in the opinion of the district judge, 288 F. Supp. 629 (1968)."

Thereafter, petitioner twice requested rehearings of those same facts, and was twice denied rehearing.

The decisions of the Courts below do not formulate new law, nor are they in conflict with any decision by this or any other Court. Petitioner now seeks a fifth review of facts important only to him.

CONCLUSION

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. SIMS,
Attorney for Respondent,
Waterman Steamship Corporation

HARRY S. REDMON, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
1300 Hibernia Bank Building
New Orleans, Louisiana 70112
Of Counsel

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BRIEF OF ALCOA STEAMSHIP COMPANY, INC., IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BENJAMIN W. YANCEY
WILLIAM E. WRIGHT
Attorneys for Respondent
2141 International Trade Mart
New Orleans, Louisiana 70130

TERRIBERRY, CARROLL, YANCEY
& FARRELL
Of Counsel

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MAY IT PLEASE THE COURT:

Not only is there no important or special reason for granting a writ of certiorari in this case, but there is no reason whatsoever to do so.

The claim of petitioner, a seaman, as against Alcoa Steamship Company, Inc., was solely to recover maintenance and cure. No claim was asserted against Alcoa for damages and no accidental injury in Alcoa's employ was alleged. At the trial in the district court, it was

contended that the seaman was suffering from grand mal epilepsy. The district judge, in a formal, written opinion, which was in every way fully supported by the record, found that the seaman:

> "... was a grand mal epileptic before, during, and after his employment aboard ... the SS ALCOA PARTNER."

The court also found that the seaman's grand mal epilepsy was not caused by, nor did it flare up during, his service with Alcoa.

From these findings, the Court concluded that the seaman was not entitled to recover maintenance and cure from Alcoa, and dismissed the complaint.

The Court of Appeals, following briefs and oral argument, affirmed without dissent the decision of the district court, finding that the record fully supported the conclusion that the seaman was an epileptic, "before, during, and after his employment ... with Alcoa".

The petition for a writ of certiorari is written as though the case had never been tried, and as though the bare, original assertions of the seaman, made in the district court, were in fact true, and had in fact been established and proven at the trial. Quite otherwise, the record here, just as the two courts below found, establishes that petitioner's condition is no different now from what it was "before, during, and after" his service with Alcoa.

Furthermore, this matter presents the clear case of a seaman, declared unfit for sea duty by the United States Public Health Service Hospital before his employment with Alcoa, misrepresenting his medical status to the shipowner, by signing aboard Alcoa's vessel and holding himself out to Alcoa as fit for duty, when he knew that he was actually unfit by reason of long-standing epilepsy and by reason of a specific unfit for duty discharge by the Public Health Service Hospital.

Accordingly, this is not a case where the seaman sustained a disabling injury while employed by the shipowner; nor does it involve an illness which flared up or manifested itself aboard the vessel. The case rather involves a seaman who has been suffering from an incurable disease, epilepsy, for many years prior to his service with the shipowner, Alcoa, and who had in fact been specifically diagnosed as an epileptic before entering the shipowner's employment.

Nothing more occurred aboard Alcoa's vessel than one or more of a long series of epileptic seizures which originally began to occur shortly after 1946, with the seizures having no side or after effects.

Finally, the seaman had actually been discharged by the Public Health Service Hospital as unfit for duty before his employment with Alcoa. As a result, when the Alcoa vessel returned to the United States in April, 1961, the United States Coast Guard, having learned that the seaman had been declared unfit for duty before joining the Alcoa vessel, immediately contacted the seaman and took up his seaman's documents. Sev-

eral days thereafter, on May 1, 1961, in an effort to have his documents returned, the seaman was admitted as an inpatient at the Public Health Service Hospital in New Orleans and was examined. The doctors concluded, just as they had concluded before the seaman was employed by Alcoa, that he was suffering from epilepsy and should remain on anticonvulsant drugs. Apparently, he did so, because there is no record of his having received medical attention or treatment of any nature or kind whatsoever during 1961 and early 1962, that is, for an entire year after leaving Alcoa's vessel. In fact, in April, 1961, the seaman returned to the hospital, not to receive medical attention or treatment, and not because the sequence of his seizures had in any way altered, but to have the doctors review his condition once again, so as to ascertain whether he was able to return to sea.

This case, therefore, falls squarely within the holdings that a seaman is not entitled to recover maintenance and cure when the illness does not occur and is not aggravated or manifested while in the service of the ship. *The Osceola,* (1903), 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760; *Warren v. United States,* (1951), 340 U.S. 523, 76 S.Ct. 423, 95 L.Ed. 503; *Edelman, Maritime Injury and Death,* Vol. I, p 9.

The case also falls squarely within the basic principle that a seaman suffering from an incurable disease is not entitled to maintenance beyond the date of maximum medical improvement. *Farrell v. U.S.,* (1949), 335 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850; *Muruaga v. United States, et al,* (C.C.A. 2nd, 1949), 172 F.(2) 318, 1949 A.M.C. 214.

Accordingly, it is respectfully submitted that the findings and judgments of the lower courts are all fully supported by the record and by the law, that there exists here no basis whatsoever for the granting of a writ of certiorari, and that the writ should be denied.

Respectfully submitted,

BENJAMIN W. YANCEY
WILLIAM E. WRIGHT
Attorneys for Respondent
2141 International Trade Mart
New Orleans, Louisiana 70130

TERRIBERRY, CARROLL, YANCEY
& FARRELL
Of Counsel

CERTIFICATE

I, the undersigned, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing brief for the respondent to Messrs. Kierr and Gainsburgh, 1718 National Bank of Commerce Building, New Orleans, Louisiana, 70112, attorneys for petitioner, and Messrs. Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, Louisiana 70112, attorneys for co-respondent.

New Orleans, Louisiana, March , 1970.

William E. Wright